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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 295

HENRY ODELL CALLIS, as Guardian, and as Guardian ad Litem of DAVID MANUEL MENDEZ, an infant,

and

ODELL CALLIS, as Administrator of the Estate of ANN JANET CALLIS MENDEZ, deceased,

and

JAMES H. BATEMAN, as Administrator of the Estate of MANUEL ENRIC MENDEZ CUEVAS, deceased,

Petitioners,

v.

THE LONG ISLAND RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PAUL S. EDELMAN,
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v.

THE LONG ISLAND RAILROAD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Peitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on March 28, 1967.

Citations to Opinions Below

The opinion of the Court of Appeals for the Second Circuit, printed in Appendix B hereto, is reported at 372 F. 2d 442.

Jurisdiction

The decision of the Court of Appeals was rendered on February 14, 1967 (223a).* Rehearing was denied and judgment was entered on March 28, 1967. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

Questions Presented

1. Whether it is proper to apply a state or Federal test of sufficiency of the evidence to withstand a motion for a directed verdict where Federal jurisdiction is based on diversity of citizenship.

2. Whether the evidence of respondent's negligence, measured by the applicable test, was sufficient to establish a *prima facie* case.

Rule, Statute and Amendment Involved

This case raises issues under Rule 50 of the Federal Rules of Civil Procedure, under the New York Wrongful Death Law and under the Seventh Amendment to the Constitution of the United States.

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* References designated "(a)" are to the Appendix to Appellants' Brief in the Court of Appeals supplemented by Proceeding in said Court.

Statement

This action was brought for the benefit of a little boy, now 8 years old who was orphaned and himself injured as the result of a collision at respondent's grade crossing between respondent's train and the car in which the boy was riding seated between his parents.

The trial was conducted before the Honorable Leo F. Rayfiel, United States District Court Judge, and a jury. Petitioners called Myron Bonis, an independent witness, who testified that he was driving his car immediately behind the car which was struck as it approached the crossing. The fatal car, according to Bonis came to a virtual halt before starting across the tracks (36a-38a). As it was straddling the tracks it was hit broadside by the front of respondent's locomotive and pushed approximately 845 feet along the tracks (39a, 147a). The train, according to respondent's engineer, had been traveling at about 65 miles per hour (162a-163a).

According to Bonis, immediately on the right at the crossing, the direction from which the train had come, there was a mound of dirt which was overgrown with weeds and definitely obstructed a view of a driver trying to look up the tracks (42a-43a, 58a, 64a). The mound and weeds were on respondent's right of way (13a, 42a). Moreover, as a driver was approaching the tracks his vision was partially obstructed by a chain link fence and then an abandoned warehouse approximately 60 feet before reaching the tracks (88a-89a). Bonis further testified that he had no recollection of hearing a signal or warning of any kind from the train as it approached the crossing (38a).

Respondent moved at the close of petitioner's case for a directed verdict under Rule 50 of the Federal Rules of Civil Procedure. This motion was denied on the ground

that the testimony of Bonis about the mound of dirt and weeds obstructing one's vision raised an issue of fact for the jury to determine (181a). Respondent rested without offering any evidence and renewed its motion for a directed verdict. This motion was granted.

Reasons for Granting the Writ

A. Neither the District Court, in directing the verdict against petitioners, nor the Court of Appeals in affirming the order of the District Court articulated the standard used to determine the sufficiency of the evidence. As of now the applicable standard is unknown. On two occasions this Court has left open the question as to whether the sufficiency of the evidence in a diversity case is to be measured by a Federal or a state standard. *Mercer* v. *Theriot*, 377 U. S. 152 (1964); *Dick* v. *New York Life Ins. Co.*, 359 U. S. 437, 444-45 (1959). In many cases, the question is moot because the standard is the same. See, e.g., *San Antonio* v. *Timko*, 368 F. 2d 983, 985 (2nd Cir. 1966). The question ascends the pedestal of importance, however, where, as here, the standards differ.

Under the federal standard the evidence must be "substantial" to require its submission to the jury. *O'Connor* v. *Pennsylvania R.R. Co.*, 308 F. 2d 911 (2d Cir. 1962). A mere scintilla is not enough. *Gunning* v. *Cooley*, 281 U. S. 90, 94 (1930). This is also the standard in a mere personal injury case in New York. *O'Connor* v. *Pennsylvania R.R. Co.*, *supra*. Under New York's Wrongful Death Act (N. Y. Dec. Est. Law, §§ 130-134), on the other hand, "a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence." *Andersen* v. *Bee Line*, 1 N. Y. 2d 169, 172 (1956); *Wragge* v. *Lizza Asphalt Construction Co.*, 17 N. Y. 2d 313, 320 (1966); *Swensson* v. *New York, Albany Desp. Co.*, 309 N. Y. 497, 503 (1956).

New York courts have described this lesser degree of proof as "slight proof" (*Noseworthy* v. *City of New York*, 298 N. Y. 76, 80 (1948)), as a "showing . . . however slight" (*Wank* v. *Ambrosino*, 307 N. Y. 321, 323, 324 (1954)) and as "meager" (*Frate* v. *State of New York*, 245 App. Div. 442, 283 N.Y.S. 686, 689 (3rd Dept. 1935)). In a wrongful death case, therefore, under New York law the standard is that a mere scintilla of evidence of a defendant's negligence is all that is required to submit a case to the jury. Where, in a case such as this, therefore, selection of the appropriate standard may affect the substantive rights of the parties, the issue of which standard to apply should be resolved.

The need to settle this issue now becomes apparent in the face of the proliferation of divergent views in the various circuits as to the applicable standard, state or federal. *Compare, Trivette* v. *New York Life Ins. Co.*, 283 F. 2d 441 (6th Cir. 1960), *cert. denied*, 368 U. S. 838 (1961); *Rowe* v. *Pennsylvania Greyhound Lines, Inc.*, 231 F. 2d 922 (2d Cir.), *cert. denied*, 351 U. S. 984 (1956); *Cooper* v. *Brown*, 126 F. 2d 874 (3rd Cir. 1942), *with Curry* v. *Pyramid Life Ins. Co.*, 271 F. 2d 1 (8th Cir. 1959), *cert. denied*, 361 U. S. 933 (1960); *Phipps* v. *N. V. Nederlandsche Amerikaansche, S.M.*, 259 F. 2d 143 (9th Cir. 1958); *Davis Frozen Foods* v. *Norfolk Southern Ry. Co.*, 204 F. 2d 839 (4th Cir.), *cert. denied*, 346 U. S. 824 (1953).

It is submitted that the applicable test is the New York standard in that the cause of action is not one arising at common law but has been statutorily created. *Greco* v. *S. F. Kresge Co.*, 277 N. Y. 26 (1938). Embodying as it does, therefore, a state policy the entire rationale behind the statute should govern. The New York Courts have reasoned that in wrongful death cases the decedent is unavailable to relate his version of the incident, therefore, the evidence required to take his case to the jury should

be slight. *Wragge* v. *Lizza Asphalt Construction Co., supra; Andersen* v. *Bee Line, supra; Swensson* v. *New York, Albany Disp. Co., supra; Noseworthy* v. *City of New York, supra.*

B. Measured against the appropriate New York standard for death cases, the evidence was sufficient to go to the jury. There was evidence that respondent's train was speeding through the crossing where *on its property* there existed an obstruction to the vision of motorists using that crossing. There was also evidence that the approaching train had sounded no warning.

A reading of the opinion of the Court of Appeals (Appendix B) reveals that the Court rejected petitioners' contention of restricted visibility by weighing only that evidence which it considered as conflicting with petitioners' contention. The evidence referred to is the testimony of one Covello, an expert witness called by petitioners to the effect that the view from fifty feet before reaching the tracks to the tracks themselves was unobstructed. Indeed, it may have been at the time Covello first visited the scene which was two and one-half years after the incident but the testimony of Bonis was that on the day of the incident it was obstructed (77a). Moreover, the testimony of Covello was not that the view along the tracks was unlimited but rather his testimony was that certain photographs, which were respondent's exhibits, depicted an unlimited view (104a, 106a). These very photographs, however, had already been characterized by Bonis as *not* depicting the view a driver approaching the tracks would have because the photographs were taken from a height above the eye-level of a driver. The weight to be given these photographs was for the jury. *Cf., Brubeck* v. *Penn. R.R. Co.*, 346 F. 2d 238 (7th Cir. 1965).

It is petitioners' position that under the applicable criterion, the Court, on a motion for a directed verdict, could neither disregard evidence probative of petitioners' con-

tention, which it did by disregarding Bonis' testimony that the view was obstructed; nor could it weigh conflicting evidence as to whether there was restrictive visibility along the tracks, which it did by considering Covello's testimony. *Andersen* v. *Bee Line, supra.*

By departing from the applicable standard in reviewing the sufficiency of petitioners' evidence on the motion for a directed verdict, the Court deprived petitioners of their right under the Seventh Amendment of the United States Constitution to trial by jury. *Cf., Slocum* v. *New York Life Ins. Co.,* 228 U. S. 364 (1913).

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

LEE S. KREINDLER,
PAUL S. EDELMAN,
Counsel for Petitioners.

June 23, 1967

APPENDIX A

Rule and Amendment Involved.

Rule 50, Federal Rules of Civil Procedure

(a) Motion for Directed Verdict: When Made; Effect. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

* * * * *

New York Decedent Estate Law

§ 130. Action by executor or administrator for negligence or wrongful act or default causing death of decedent

The executor or administrator duly appointed in this state or in any other state, territory or district of the United States, or in any foreign country, of a decedent who has left him or her surviving a husband, wife, or next of kin, may maintain an action to recover damages for a wrongful act, neglect or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent by reason thereof if death had not ensued. Such an action must be commenced within two years after the decedent's death. When the husband, wife or next of kin, do not participate in the estate of decedent, under a will appointing an executor, other than such husband, wife or next of kin, who refuses to bring such action, then such

husband, wife or next of kin shall be entitled to have an administrator appointed for the purpose of prosecuting such action for their benefit.

Amendment VII

In suits at common law, where the value in the controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States (other?) than according to the rules of the common law.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 262—September Term, 1966.

(Argued December 15, 1966 Decided February 14, 1967.)

Docket No. 30349

HENRY ODELL CALLIS, as Guardian, and as Guardian *ad Litem* of DAVID MANUEL MENDEZ, an infant,

—and—

ODELL CALLIS, as Admr. of the Estate of ANN JANET CALLIS MENDEZ, deceased,

—and—

JAMES H. BATEMAN, Admr. of the Estate of MANUEL ENRIC MENDEZ CUEVAS, deceased,

Plaintiffs-Appellants,

—v.—

THE LONG ISLAND RAILROAD COMPANY,

Defendant-Appellee.

Before:

WATERMAN, MOORE and KAUFMAN,

Circuit Judges.

Appeal from an order, United States District Court for the Eastern District of New York, Rayfiel, *J.*, granting defendant-appellee's motion for directed verdict and dismissing appellants' complaint. Affirmed.

MILTON G. SINCOFF, HARRY E. KREINDLER, PAUL S. EDELMAN, Kreindler & Kreindler, New York City, *for Plaintiffs-Appellants.*

WILLIAM F. MCNULTY, PAUL J. DONNELLY, JR., GEORGE M. ONKEN, Jamaica, New York, *for Defendant-Appellee.*

PER CURIAM:

This is an appeal from an order of the United States District Court for the Eastern District of New York, wherein the trial judge granted a motion for a directed verdict against appellants and dismissed their complaint. Appellants seek a remand for a new trial.

This action arises out of a railroad grade crossing accident when an automobile in which Manuel Enric Mendez Cuevas, his wife Ann Mendez, and infant son David Mendez, were traveling collided with one of appellee's trains. The accident occurred at about 4 P. M. on October 13, 1960 at a crossing maintained by the appellee on Mill Road in the town of Riverhead, Suffolk County, New York. Cuevas's car approached the crossing from the south and while on it was struck by a train proceeding from east to west. Cuevas and his wife were killed and their son was injured in the collision. The action was brought in federal court by the administrators of Manuel and Ann and the guardian of David. Jurisdiction was based on diversity of citizenship.

After plaintiffs presented their case defendant rested without producing any witnesses and moved for a directed verdict. The court granted the motion because it found no evidence of defendant's negligence requiring submission of the case to the jury. We agree with this disposition and will comment only briefly on the several claims of negligence advanced by the appellants.

Appellants tried to establish that Cuevas's view of the approaching train was obstructed by various obstacles, but their expert Covello admitted that from a point fifty feet south of the crossing to the crossing there was unobstructed, unlimited visibility to the east along the tracks. This is an ample unobstructed view for a driver who properly looks along the track to see if a train is approaching before he proceeds to cross at a grade crossing.

Another claim of negligence that appellant raises is that the train was negligently proceeding at an excessive speed. The only testimony with reference to the speed of the train was that of the engineer Edgar that the train was going about 52 miles per hour, and that of Bonis, a driver behind Cuevas, that the train was going "very fast." We find no basis from this testimony to conclude that the train might have been exceeding a normal operating speed for the crossing.

Appellants also claim defendant was negligent in failing to give the required warning of the approach of the train by sounding its whistle. The testimony relevant to this is that of the engineer Edgar who stated that he blew the whistle continuously from the whistling post 1400 feet east of the crossing until the accident occurred, and the testimony of motorist Bonis that he had no recollection of hearing a whistle or bell. The trial court concluded that Bonis's lack of any recollection at all as to this matter was so indefinite and uncertain as to have no probative value. We agree. It would seem that any finding that appellee failed to sound a warning solely on this testimony would be only speculation.

Appellants also claim that there is a proper issue for jury determination relative to the inadequacy of the warning devices at the crossing. The warning devices were those required by the New York Public Service Commission and thus were sufficient.

Additionally, plaintiffs maintain that they are entitled to a new trial because the court excluded evidence that other accidents had occurred at the crossing. Proof that these prior accidents had occurred was properly excluded because plaintiffs failed to show that those accidents occurred under conditions similar to this accident and no proper foundation for admission of the offered evidence was laid.

Affirmed.

SUPREME COURT, U. S.

JUL 20 1967

JOHN F. DAVIS, CLERK

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and

JAMES H. BATEMAN, as Administrator of the Estate of Manuel Enric Mendez Cuevas, deceased,

Petitioners,

against

THE LONG ISLAND RAILROAD COMPANY,

Respondent.

BRIEF OF RESPONDENT, THE LONG ISLAND RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF OF RESPONDENT, THE LONG ISLAND RAILROAD COMPANY, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

(All numerals herein followed by the letter "a" refer to the pages of the appendix heretofore filed by petitioners on their appeal to the United States Court of Appeals for the Second Circuit.)

Preliminary Statement

This brief is being submitted by respondent, The Long Island Railroad Company, in opposition to the petition

of the petitioners herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Shortly before 4:00 o'clock on the afternoon of October 13, 1960, an automobile operated by the decedent, Manuel Enric Mendez Cuevas, in which the infant son and the wife of said decedent were passengers, was struck by a westbound passenger train of the respondent, The Long Island Railroad Company, at the grade crossing on Mill Road, in the Town of Riverhead, County of Suffolk. Cuevas and his wife, the decedent, Ann Janet Callis Mendez, were killed, and their infant son, David Manuel Mendez, sustained personal injuries.

The present action, in which Federal jurisdiction was based on diversity of citizenship, was thereafter brought in the United States District Court for the Eastern District of New York, to recover damages for the personal injuries sustained by the infant, David Manuel Mendez, and for the death of his parents, the decedents, Manuel Enric Mendez Cuevas and Ann Janet Callis Mendez. The death actions were brought pursuant to Section 130 of the Decedent Estate Law of the State of New York, the provisions of which are set forth in Appendix A (pp. 8-9) of the petition herein.

The case was tried before Hon. Leo F. Rayfiel and a jury in the United States District Court for the Eastern District of New York. At the close of the plaintiffs' case the respondent, The Long Island Railroad Company, hereinafter designated "Railroad", rested and moved for a directed verdict. After hearing oral argument by counsel, the Court granted said motion (27a, 210a-213a).

The judgment of the District Court was thereafter unanimously affirmed by the United States Court of Appeals for the Second Circuit and a motion for a rehearing was thereafter denied by said Court.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit was rendered on February 14, 1967, and is reported at 372 F. 2d 442. It is also set forth in Appendix B (pp. 10-13) of the petition herein. Petitioners' motion for a rehearing in said Court was denied and judgment was entered on March 28, 1967.

The opinion of the District Court, which is unreported, will be found at pages 210a-213a of the Appendix filed by petitioners in the Court of Appeals on their appeal to said Court.

Jurisdiction

Petitioners invoke the jurisdiction of this Court under 28 U.S.C., Section 1254 (1).

Questions Sought to Be Reviewed

Although no such question was raised either in the District Court or in the Court of Appeals and, as will hereinafter be demonstrated, the question is a purely moot one in the case at bar, petitioners are requesting this Court to determine whether in an action brought in the United States District Court, where Federal jurisdiction is based on diversity of citizenship, the State or the Federal test of the sufficiency of the proof to withstand a motion for a directed verdict should be applied.

As an incident thereto, petitioners are further requesting this Court to determine whether the proof of negligence herein, "Measured by the applicable test", was sufficient to establish a *prima facie* case.

Facts

The accident herein occurred at approximately 3:57 o'clock on the afternoon of October 13, 1960 (19a), which was a clear, dry day (152a). The car operated by Cuevas, an airman in the United States Air Force, stationed at the Suffolk County Air Base, was at the time proceeding north on Mill Road (19a).

Mill Road is a two-lane black asphalt secondary road located on the outskirts of the Town of Riverhead (32a; Deft's Exh. B). It starts at Motor Vehicle Route 25 (also known as Jericho Turnpike), which is located approximately 800 feet south of the grade crossing involved herein, and extends north to the Riverhead By-pass, which is known as Motor Vehicle Route 58 (32a, 112a-113a). From Route 25, which is shown in the background of the panoramic photograph marked Defendant's Exhibit A, to the single track of the railroad, Mill Road is "basically a straight road" (124a). It crosses the track of the Railroad at an angle of 80 degrees (123a).

Despite the plaintiffs' claim to the contrary, it is clear beyond doubt from the photographic proof in the case—particularly from the panoramic photograph marked Defendant's Exhibit A, which shows the crossing looking south or in the direction from which Cuevas was approaching (53a), and the panoramic photograph marked Defendant's Exhibit C, which shows the crossing looking north or in the opposite direction (58a-59a)—that the crossing is not a "dangerous" crossing in any fair sense of the term. In any event, the Public Service Commission of the State of New York, which is vested by law with jurisdiction over such matters (Railroad Law, Sec. 53), certainly did not regard it as such, because it did not see fit to direct that the crossing be equipped with crossing gates or lights or any of the other mechanically or electrically operated protective devices that the Commission usually requires to be installed

at grade crossings located in congested areas or that it regards as "dangerous" crossings.

Motorists approaching the crossing from the south, as Cuevas admittedly was doing at the time that the accident herein occurred (49a-50a), were amply warned of the presence of the railroad track, first, by a yellow and black reflectorized railroad crossing warning disc located on the right-hand or easterly side of the roadway some 250 feet south of the railroad track (82a, 111a-112a, 153a-154a), and then, by the large white and black conventional cross-buck railroad crossing warning signs, conspicuously shown in the photographs marked Defendant's Exhibits A, B and E, which are located at the southeasterly and the northwesterly corners of the crossing itself (82a). The yellow and black reflectorized railroad crossing warning disc, which is required by Section 53-a of the Railroad Law of New York, is a circular disc 30 inches in diameter, mounted on a stanchion located 6 feet to the right or the east of the roadway. On its yellow background there is a large black "X", with the block capital letters "RR" above and under it (12a). The conventional X-shaped or cross-buck railroad crossing warning sign located at the southeasterly corner of the crossing is mounted on a high stanchion located approximately 8 feet east of the easterly side of Mill Road and 14 feet 10 inches south of the southerly rail of the track and bears the warning words, "Railroad Crossing" (82a, 150a).

As the Court will see when it examines the panoramic photograph marked Defendant's Exhibit A, the only thing that could possibly obstruct the view of a northbound motorist of a train approaching from the east, as he approached the crossing, is the deserted warehouse shown in this photograph, which is located on the easterly side of Mill Road some distance south of the railroad track. A small portion of this warehouse is also shown at the extreme right of the panoramic photograph marked Defend-

ant's Exhibit C. According to the plaintiffs' witness, Covello, the civil engineer who made the survey marked Plaintiffs' Exhibit 6 (80a-81a), the northerly side of said warehouse, which runs parallel with the track, is located 60 feet south of the southerly rail of the railroad track and the westerly side thereof, which is 55 feet long, is located 85 feet east of the easterly side of Mill Road (88a).

It will thus be seen that, when a northbound motorist reaches a point 60 feet south of the railroad track, which is perfectly straight and level to the east of the crossing almost as far as the eye can see (Deft's Exh. A), he would have a clear and unobstructed view of a train approaching from this direction. When it is considered that a Diesel engine, like the one shown in the photograph marked Plaintiffs' Exhibit 2, is approximately 45 feet long and some 12 or 14 feet high (105a), it is submitted that the plaintiffs' claim in the courts below that the crossing was a dangerous one for motorists travelling north on Mill Road is wholly lacking in substance.

Even Covello, whom the plaintiffs called as an expert for the ostensible purpose of trying to create the impression that this open grade crossing was a "dangerous" one (96a-98a, 130a-131a)—although it is quite apparent from the record that he had very little, if indeed any, expertise on the subject of grade crossings (103a)—admitted on cross-examination that, when a northbound motorist reached a point at least 50 feet south of the southerly rail of the railroad track, he would have an "unimpeded, unlimited view of a thousand feet or more" to the east and that, if he looked to the east at this point, he could see "a locomotive engine coming if it were a thousand feet away" (104a).

Although there was some suggestion at the trial that the cyclone fence shown in the panoramic photograph marked Defendants' Exhibit A might possibly prevent a north-

bound motorist from seeing a train approaching from the east when he reached a point 50 feet or so south of the tracks—this erroneous impression was completely dispelled by the plaintiffs' own proof. The plaintiff's expert, Covello, testified that the cyclone fence was 270 feet east of Mill Road at its nearest point (114a). As the Court will see when it examines the panoramic photograph marked Defendant's Exhibit A, when Cuevas reached a point some 50 feet or so south of the southerly rail, it would have been a physical impossibility for the northerly side of this cyclone fence to have obscured his view of the westbound train then approaching from the east and which was at the time virtually at the crossing. As already noted, even the plaintiffs' own expert, Covello, admitted that at a point 50 feet or so south of the southerly rail a northbound motorist could see "a locomotive engine coming if it were a thousand feet away" (104a).

The train involved in the accident herein was a westbound passenger train consisting of an Alcoa Diesel engine, two baggage cars, a mail car and three passenger coaches (156a). It had left Greenport at 3:10 o'clock that afternoon on its scheduled westbound run to Jamaica (157a).

The plaintiffs read into evidence as an integral part of their affirmative case the deposition of Edgar, the engineer, and Van Wormer, the fireman of the train, taken on the examination before trial of the Railroad.

Edgar, the engineer, was 67 years of age and in retirement at the time that his deposition was taken (155a). He had been an engineer since 1923 and had been the regular engineer on this particular run for three years (155a, 156a). He testified that the last station stop before the train reached Mill Road was at Riverhead, which the train reached sometime around 3:40 o'clock that afternoon (158a). It left Riverhead "two or three minutes" later and then continued east at a speed of about 20 miles an hour until it left the "yard limit", which extends for

some distance west of the Riverhead station (137a, 159a). After leaving the Riverhead "yard limit", Edgar testified that he started gradually to work the train up to its normal running speed of 65 miles an hour (137a, 159a). Just before the accident occurred he looked at the speedometer and it then registered "about fifty-two" miles an hour (159a). He testified that the train would not reach its maximum running speed of 65 miles an hour until it got "pretty well to where there is an overhead bridge" located "halfway between Riverhead and Calverton", which is some distance west of Mill Road (162a).

Edgar didn't see the accident because he was sitting on the engineer's seat on the right-hand or northerly side of the engine cab, about 40 feet behind the front of the Diesel engine (159a-160a), looking out through the "windbreaker" on that side of the engine (760a). Consequently, all that he knew about the accident was that just before the engine reached the Mill Road crossing—it "hadn't quite hit the crossing"—the fireman yelled to him, "Dump her", which in railroad parlance means to apply the emergency brakes (163a). He further testified that, as the train approached the crossing on Mill Road, he started to blow the crossing whistle when the engine passed the whistling post located some 1400 feet or so east of the crossing (163a) and that he was still blowing the whistle when the fireman yelled, "Dump her" (163a, 166a). He estimated that the engine was about 50 feet east of the crossing when the fireman yelled, "Dump it" (164a) and that the train thereafter travelled "a little over eight hundred feet" before it came to a stop (164a).

Van Wormer, the fireman, testified that the train left the Riverhead station "on time" or at 3:55 o'clock that afternoon and then proceeded west at a speed of 20 miles an hour until it reached the westerly end of the station "yard", which is located at "Milepost 73" (133a-134a). He estimated that it took "around two, two and a half minutes" or "something like that" for the train to travel

from the Riverhead station to Mill Road (134a). The witness testified that, after the train left the Riverhead "yard", "we gradually increased our speed" (133a), but he was not asked how fast the train was going at the time that it reached Mill Road or, if he was questioned about this, this portion of his deposition was not read into evidence at the trial.

From his vantage point on the left-hand or southerly side of the engine cab, Van Wormer saw the car operated by Cuevas as it approached the railroad track. When he was asked to describe what he saw, he testified (134a):

> "I was sitting on the fireman's seat, looking ahead and everything, and the train was (178) gathering speed. About 100 feet from the crossing, I noticed this car's nose beyond that building [referring to the warehouse hereinabove described] traveling about thirty—I guess, thirty-five miles an hour. At that moment I yelled 'Dump it.' About a second and a half or two seconds later the impact occurred.
>
> "Question: You say you were approximately 100 feet from the crossing when you first saw the vehicle?
>
> "Answer: That's right.
>
> "Question: What was the position of the vehicle when you first saw it in relation to the track?
>
> "Answer: Heading north.
>
> "Question: Approximately where was the front bumper of the vehicle from the southernmost portion of the rail?
>
> "Answer: It was around 60 feet; around in there. I can't actually judge too close. Around sixty feet, I guess.
>
> "Question: You say, at that point, you yelled for the engineer to dump it; is that right?
>
> "Answer: Yes."

The witness estimated that the train travelled a distance of about 930 feet between the time that he yelled to the

engineer, "Dump it", and the time that it came to a stop (134a-135a).

When he was questioned about the movement of the car operated by Cuevas between the time that he first observed it approaching the track and the time that it was struck by the engine, he testified (136a-137a):

> "Question: At the time you had this vehicle in view, the one that was struck, to the time of the impact, did you see it at any time stop?
>
> "Answer: No, sir, I didn't.
>
> "Question: Did it seem to be coming faster or slower at any point?
>
> "Answer: It maintained a steady rate of speed.
>
> "Question: Did you have it in view at all times prior to the impact.
>
> "Answer: Right up to the impact."

The plaintiffs also called as a witness on their behalf Sergeant Harris and Lieut. Palmer, of the Riverhead Police Department (146a, 171a), and an alleged eyewitness, named Myron Bonis (30a).

Sergeant Harris, the police officer who investigated the accident, arrived at the scene at 4:03 o'clock that afternoon (146a). He testified that, when he got there, he found the car operated by Cuevas "hooked on the cowcatcher" of the engine, which was then 845 feet west of the crossing (147a). He identified the photographs marked Plaintiffs' Exhibits 2 and 3 as showing the position and the condition of the car when he arrived at the scene (148a). Although he observed that the front of the engine was damaged, he was unable to describe the extent of the damage (149a). The body of Cuevas was lying about 2 or 3 feet north of the north rail of the track at a point 200 feet west of the crossing and the body of his wife was "230 feet west of Mill Road and approximately the same distance from the track on the north side" (149a). The child was lying in a

baby car seat on the front seat of the vehicle, "covered with glass, a little sand, a little blood" (150a). When the witness was asked how far south of the tracks the warehouse on the easterly side of Mill Road was located, he testified, "Truthfully I wouldn't know. I would say roughly from seventy-five to a hundred feet" (151a). He was then asked if there was any "shrubbery alongside" the rails, and he testified, "That I couldn't say" (151a).

Harris had previously been asked if he knew Bonis, who was the plaintiffs' first and only so-called eye-witness and he replied, "Yes, I do." He was then asked if he saw Bonis at the scene of the accident and he testified that he saw him there with "a number of people" (147a): When he was asked if he got the name of Bonis as a witness to the occurrence, however, he testified, "No, sir" (147a). He also testified that the accident occurred on a "clear and dry" day (152a).

Lieut. Palmer also arrived at the crossing after the accident occurred. He merely identified a photograph that he took "within a half hour after the accident" occurred as fairly representing "the railroad track looking in an easterly direction" (171a). When this photograph was offered into evidence, however, at the request of the Railroad, a side bar conference was held, and the witness was thereupon withdrawn, without the photograph being received into evidence.

At the time of the accident Cuevas was an airman, second class in the United States Air Force, stationed at the Suffolk County Air Base. It is conceded in the Pre-Trial order that the car that he was driving was a 1955 4-door Chevrolet bearing Tennessee license plates, which at the time of the accident was "traveling in a northerly direction on Mill Road" (19a).

The only alleged eye-witness to the accident called by the plaintiffs was a "truck broker", named Myron Bonis,

whose place of business was on Mill Road (30a). As already noted, Sergeant Harris of the Riverhead Police Department admitted that he saw Bonis at the scene of the accident that afternoon, but he emphatically denied that he obtained his name as an eye-witness to the occurrence (147a).

Although Bonis claimed that he used Mill Road "at least three times a day, coming to and going from work and going to lunch and coming back again" (31a), he could not recall whether or not the black and yellow railroad grade crossing warning disc located along the easterly side of the road at a point some 250 feet south of the railroad track was there on October 13, 1960. When the Court then asked him if he could describe this sign, he testified, "Your Honor, it is five years since the accident and I don't think I could describe the sign today" (33a).

On direct examination this dubious eye-witness claimed that shortly before the accident occurred he turned from Route 25 or Jericho Turnpike into Mill Road and then continued north on Mill Road at a speed of "about thirty, thirty-five miles an hour" and that, as he proceeded north on Mill Road, he saw another vehicle "several lengths in front of me". He testified that, because this other vehicle was travelling at "approximately the same speed or a little slower" than his car was travelling, "I had to slow down as I came up to him" (36a). He claimed that, as the car in front of him approached the railroad crossing, the driver stepped on his brakes and that "his brake lights went on", and then "the next thing that I knew the train hit the car" (37a). When the witness was questioned further about this, however, he testified that, as the car in front of him, which carried Tennessee license plates, approached the railroad track, it was travelling "about twenty, twenty-five miles an hour" and that the brake lights on the rear of the car went on and that the vehicle then came "almost to a standstill" about "a car length"

away from the southerly rail of the track (37a). The witness was asked if "you have any recollection at all of hearing the whistle of the train" before the accident occurred, and he testified, "No". He was then asked if he heard "the bell of a train", and he testified, "No, it might have blown but I don't remember" (38a). The only thing that he noticed about the speed of the train was that it was "going very fast" (38a). The witness identified the photographs marked Plaintiffs' Exhibits 2, 3 and 4 as showing the car in front of the locomotive after the train stopped (39a).

When Bonis was first asked on direct examination how close the warehouse on the easterly side of Mill Road was "to the first railroad track", he testified, "Gee, I couldn't —I would be guessing the distance, possibly a hundred feet, something like that", but his testimony in this regard was stricken out. He was then shown a photograph and asked what the distance was "to the best of your recollection", and he testified, "It looks like about fifty feet" (41a). He also testified that there was a chain link fence running parallel to Mill Road, which is shown in the panoramic photograph marked Defendant's Exhibit A, between this structure and the railroad track (41a-42a). As the Court will see when it examines Defendant's Exhibit A, however, this chain link fence is not "between" the warehouse and the track, but in front of and alongside the warehouse. He further testified that there was "a mound of earth close to the tracks on the right hand side" of Mill Road that would obscure the view of a motorist to the east, if his car stopped "about one or two car lengths back" of this mound (43a). As the Court will see when it examines the panoramic photograph marked Defendant's Exhibit A, this mound of earth, which is shown therein, as well as in Defendant's Exhibit C, could not possibly have obscured a Diesel engine some 45 feet long and some 12 or 14 feet high (105a), hauling six cars, from the view

of a motorist approaching the crossing from the south, if his car stopped one or two car lengths or at any other distance back of it.

When Bonis, who was alone in his car at the time that the accident occurred (44a), was asked at the conclusion of his direct examination if he gave his name to the police as an eye-witness to the occurrence, he testified, "Not as I recall" (45a).

On cross-examination the witness again admitted that he had no recollection of giving his name to the police (47a, 48a). When he was asked at what point he first observed the car in front of his car, he testified, "I don't remember now" whether "I was halfway down to the tracks or whether I had just made the turn" from Route 25 or Jericho Turnpike into Mill Road (52a).

At a later point on cross-examination Bonis, after his recollection had been refreshed by a signed statement that he had previously given to the plaintiffs' counsel (52a), was pointedly asked if it wasn't the fact that, after the car in front of him slowed down as it approached the railroad track, "It started up again and went right over in front of the train", and he replied, "Yes, sir" (53a). The witness was then shown the panoramic photograph marked Defendant's Exhibit A and asked if he recognized it as "the scene looking from north to the grade crossing, southerly all the way down to Route 25", and he replied in the affirmative. He further testified that this was the way that the scene generally "appeared on the day of the accident" (53a). The photograph was thereupon received into evidence as Defendant's Exhibit A, subject only to the understanding that the markings on its face were not to be deemed a part of "the photograph or exhibit". Although the plaintiffs' counsel at first objected to the date, October 18, 1960, on the back of the photograph, indicating that it was taken only five days after the accident occurred, he later withdrew this objection when the Court observed

that, "if it is a photograph of the condition as it then existed, what difference does it [the date] make" (55a).

The witness also identified the panoramic photograph marked Defendant's Exhibit C as being a photograph taken from a position "south of the grade crossing looking to the north and to the east" and as generally depicting "the way that the topography appeared on the day of the accident" (58a-59a).

It will thus be seen that both of these key items of photographic proof were received into evidence upon the basis of the testimony of Bonis that they generally depicted the topography at the crossing and the surrounding terrain on the date that the accident occurred.

In granting the respondent's motion for a directed verdict, the District Court, after carefully reviewing all of the proof, stated that "For all of these reasons I feel that there is not a scintilla of evidence that justifies my submitting the case to the jury, and I am going to grant the defendant's motion for a direction of a verdict in favor of the defendant" (213a), which, it is submitted, completely answers petitioner's contention that, in directing a verdict in favor of the respondent, the District Court may possibly have applied the Federal test under which the evidence must be "substantial" before a case can be submitted to the jury (*O'Connor* v. *Pennsylvania R. Co.*, 308 F. 2d 911, 2 Cir., 1962).

It is equally clear from the opinion of the Court of Appeals that, in unanimously affirming the judgment of the District Court, the Court of Appeals likewise applied the same test that the District Court used in determining the legal sufficiency of the proof herein.

Reasons for Denying Writ

It is submitted that the petition for a writ herein should be denied for the following reasons:

I.

The question which petitioners are now requesting this Court to review was never raised either in the District Court or in the Court of Appeals.

It is well settled that this Court will not review a question which was not raised below, unless the circumstances presented are exceptional, which clearly is not the situation presented in the case at bar.

> *Lawn* v. *United States,* 355 U. S. 339, 362, 78 S. Ct. 311 2 L. Ed. 2d 321, rehearing denied 355 U. S. 967, 78 S. Ct. 529, 2 L. Ed. 2d 542 (1957).

II.

Under the proof adduced by petitioners at the trial of this action, the question which the petitioners are now requesting this Court to review is purely academic or moot.

In seeking to establish a difference between the test as to the legal sufficiency of the proof under the Federal rule and under the so-called New York rule, petitioners rely heavily on *Noseworthy* v. *City of New York,* 298 N. Y. 76, 80, wherein the Court of Appeals of New York held that "in a death action a plaintiff is not held to as high a degree of proof of the cause of action as where an injured plaintiff can himself describe the occurrence", and the New York cases which follow the *Noseworthy* case. This rule, which is commonly known as the *Noseworthy* doctrine, however, does not completely dispense with the necessity of the plaintiff offering some proof that is fairly calculated to establish all of the elements of his

cause of action, to wit, the negligence of the defendant and the causal connection between such negligence and the injury resulting in the decedent's death (*Wank* v. *Ambrosino*, 307 N. Y. 321, 323-324). As the New York Court of Appeals itself emphasized in *Wank* v. *Ambrosino*, *supra*, "*Noseworthy*, and similar cases, describe a method of, or approach to weighing evidence, but there must be a showing of facts from which negligence may be inferred" and the Court then added, "Here there was none".

In the case at bar it is equally true that there are no facts from which a jury could fairly have inferred that the tragic grade crossing accident resulting in the death of Cuevas and his wife and in the injury sustained by their infant son was caused by any negligence whatever on the part of the Railroad either in the operation of its train or in the maintenance of the grade crossing involved herein, and the District Court and the Court of Appeals have both specifically so found. On the contrary, the petitioners' own proof at the trial clearly and conclusively established that the sole proximate cause of this accident was the negligence of Cuevas himself in attempting to cross the railroad track right in the path of the approaching westbound passenger train of the Railroad when the train was virtually at the crossing. The train had to be virtually at the crossing when Cuevas started across the track. Otherwise, the accident herein never would or could have occurred. In this connection it will be recalled that even the petitioners' own expert, Covello, testified that, when a northbound motorist reached a point at least 50 feet south of the southerly rail of the single track of the railroad he would have an "unimpeded, unlimited view of a thousand feet or more" to the east and could see "a locomotive engine" approaching from this direction, even though it was then "a thousand feet away" from the crossing (104a).

The grade crossing involved in this case was not a dangerous crossing in any sense of the term. As this Court

will see when it examines the photographic proof in the case, it was about as safe as any grade crossing could possibly be. Furthermore, there is not a shred of proof in the record from which a jury could fairly have inferred that the westbound passenger train of the Railroad was being operated in a negligent manner as it approached the crossing. Although much was made at the trial of the circumstance that the crossing was not protected by special safety devices, such as crossing gates, "flasher" lights or similar devices, under Section 53 of the Railroad Law of New York a railroad is not required to install special protective devices of this character at a grade crossing, unless it is directed to do so by the Public Service Commission. As the United States Court of Appeals in the Second Circuit held in *Cmuk* v. *Lehigh Valley R. Co.*, 116 F. 2d 569, 572 (1941), it has been the settled law of New York for over 70 years, beginning with *Beisiegal* v. *New York Central R. Co.*, 40 N. Y. 9, that a railroad cannot be charged with negligence in failing to install and maintain special protective devices at a grade crossing, unless it is directed to do so by the Public Service Commission, which is the agency of the State of New York that is charged with the statutory duty of seeing that all grade crossings in the State are adequately protected against the dangers which they present to the traveling public.

In its opinion of unanimous affirmance herein the United States Court of Appeals in the Second Circuit stated (Appendix B of Petition, p. 11):

> "After plaintiffs presented their case defendant rested without producing any witnesses and moved for a directed verdict. The court granted the motion because it found no evidence of defendant's negligence requiring submission of the case to the jury. We agree with this disposition and will comment only briefly on the several claims of negligence advanced by the appellants."

The Court thereafter specifically found that the crossing provided "an ample unobstructed view for a driver who properly looks along the track to see if a train is approaching before he proceeds to cross at a grade crossing"; that there was no basis for a finding that "the train might have been exceeding a normal operating speed" or that a warning signal of its approach was not given; and, finally, that there was no issue of fact for the jury "relative to the inadequacy of the warning devices at the crossing" (Appendix B of Petition, p. 12).

On the basis of these findings the respondent would have been entitled to a directed verdict even under the doctrine of the *Noseworthy* case.

This Court should not be asked to review questions which are purely academic or moot.

Dick v. *New York Life Ins. Co.*, 359 U. S. 437, 444-445, 79 S. Ct. 921, 3 L. Ed. 935 (1959).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari herein should be denied.

Dated: New York, New York, July 13, 1967.

Respectfully submitted,

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